United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,087

6673

[redacted]SPAILLAT,

Appellant,

v.

BERLITZ SCHOOLS OF LANGUAGES OF AMERICA, INC.,

Appellee.

APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

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STATEMENT OF QUESTION PRESENTED

Is a party who has been induced by fraudulent misrepresentation to enter into an employment agreement entitled to the "benefit of the bargain," i.e., the difference between the value of what the defrauded party actually received and the value of what she would have received if the representations had been true? The District of Columbia Court of Appeals answered this question "no."

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,087

IDA ESPAILLAT,

Appellant,

v.

BERLITZ SCHOOLS OF LANGUAGES OF AMERICA, INC.,

Appellee.

APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is being taken from a judgment of affirmance of the District of Columbia Court of Appeals. This Court has jurisdiction to consider and decide this appeal under the provisions of Title 11, Section 773 of the District of Columbia Code of Laws, 1961 Edition.

STATEMENT OF THE CASE

Appellant, who is a citizen of the Dominican Republic, came to the United States in February of 1962. Until June 1, 1962 she worked as a free-lance Interpreter-Translator in the District of Columbia. At that time she accepted a position in that capacity with the Appellee under an employment contract to work at the United States Army Special Warfare School at Fort Bragg, North Carolina for the period June 1, 1962 to May 31, 1963, at the monthly salary of $600.00. On July 20, 1962 her employment was terminated solely for the reason that she was an alien.[1] Thereafter, appellant filed a complaint in the District of Columbia Court of General Sessions against appellee seeking damages in the amount of $3,482.42 for breach of contract. During the course of the trial, appellant moved to amend her complaint to include a count of fraud in order to conform with the evidence. This motion was granted and appellant subsequently withdrew her count of breach of contract. The matter then was submitted to the jury under instructions dealing with fraudulent inducement. The jury rendered a verdict in favor of appellant for $2,000.00. Appellee filed a motion for judgment notwithstanding the verdict. This was granted on the ground that, although the issue of fraud was one for the jury, appellant's evidence failed to establish any basis upon which the jury could find damages. Thereupon, petitioner appealed to the District of Columbia Court of Appeals which affirmed the Trial Court's decision. It is this decision that appellant now seeks to have reversed.

In its opinion the District of Columbia Court of Appeals stated as follows:

> "In disposing of this appeal, we must analyze the record from two aspects: (1) Does it contain sufficient

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[1] That appellant's dismissal was solely attributable to her alienage was accepted as a matter of fact by the District of Columbia Court of Appeals. (JA 2)

convincing evidence to support the action of the trial judge in submitting the issue of fraud to the jury and upholding the resolution thereof by the jury in favor of appellant; and (2) Is there competent evidence therein to support the award of damages?

"Although Mrs. Espaillat was aware her employment was subject to the condition that the government reserved the right to terminate it at any time, she had, prior to actually accepting the position, specifically inquired of appellee whether the fact she was an alien would interfere with the job and was told it would not. This was untrue, as Berlitz well knew from its discussions with officials of the government. Failure of Berlitz to inform appellant that the Army had modified its policy with reference to the employment of aliens at Fort Bragg and would replace aliens in the program with United States citizens was valid grounds to support the jury's finding of fraudulent inducement to enter the employment contract.

* * *

"* * * There are two conflicting rules for the proper measure of damages in a tort action for fraud or fraudulent inducement to enter a contract for the sale or exchange of property, and although the present case does not involve the sale or exchange of property, the same rules are applicable. The weight of authority in this country sustains the general or benefit of the bargain rule that the defrauded purchaser may recover the difference between the actual value of the property at the time of making the contract and the value it would have possessed if the representations had been true. The minority rule approves as the measure of damages the difference between the actual value of the property and the amount or value of the consideration given by the defrauded party. Also allowable are so-called incidental damages to compensate the defrauded party for

> expenditures made in reliance upon the misrepresentation in order that the parties may be placed in status quo ante. This gives the purchaser only what he actually parted with or what he experienced in out-of-pocket losses by reason of the fraud. This is the Federal rule. Both the majority and the minority rules are merely applications of the underlying proximate result rule and should be employed in a flexible manner." (JA 2-3)

The District of Columbia Court of Appeals then applied the minority rule and held that since appellant's testimony did not disclose her earnings prior to her employment with appellee, there was no evidence upon which the jury could make a comparison between these earnings and those during the ten month period after her discharge.

STATEMENT OF POINTS

In certain appropriate cases, a party who has been induced by a fraudulent misrepresentation to enter into a contract is entitled to recover as damages the difference between the value of the property actually received and its value as it was represented to be.

SUMMARY OF ARGUMENT

The holding by the District of Columbia Court of Appeals that a party induced by a fraudulent misrepresentation to enter into a contract is entitled to recover as damages the difference between the value of what she actually received and the value of what she parted with is contrary to the majority rule and sound legal reasoning, has the effect of encouraging fraudulent practices and in cases such as this results in speculative damages; whereas, application of the majority "benefit of the bargain" rule, whereby the defrauded party is entitled to recover as damages the difference between the value of the property actually received and its value as it was represented to be, is in accord with the majority rule and sound legal reasoning, operates to discour-

age fraudulent practices and in a case such as this, constitutes a definite and precise measure of damages.

ARGUMENT

The measure of damages applied by the District of Columbia Court of Appeals is commonly referred to as the out-of-pocket-loss rule and is prevalent in a minority of jurisdictions. 124 ALR 39. This rule, which was ill-conceived in its origin, would place the defrauded party in the position in which he found himself at the time of the fraudulent inducement. However, in actual operation, the effect of the rule is to impose an injustice upon the defrauded party while it works to the advantage of the perpetrator of the fraud. In the sale of land, for example, where one is induced by fraudulent statements to purchase property which is not of the value represented, the defrauded party's only recovery under this rule is the difference between the value of what was paid under the fraudulent inducement and the actual value of the land — not the value that was represented. 124 ALR 82. In this way, the defrauded party often is denied the full benefit of his bargain, even though the benefit was the inducement for the bargain in the first place, and the perpetrator of the fraud is able to avoid being held to his representation.

The majority benefit-of-the-bargain rule provides the only equitable and fair result. A clear and comprehensive description of this measure of damages is found in *S. W. Selman et ux. v. H. E. Shirley et al.*, 85 P.2d 384, 125 ALR 1, (1938), which involved a sale of land but which is nevertheless in point.[2] That case held as follows:

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[2] The District of Columbia Court of Appeals itself stated as follows: ". . . . There are two conflicting rules for the proper measure of damages in a tort action for fraud or fraudulent inducement to enter a contract for the sale or exchange of property, and although the present case does not involve the sale or exchange of property, the same rules are applicable." (JA 3)

> "...the party guilty of fraud is liable for such damages as naturally and proximately resulted from the fraud. This is the universal rule. . . . Our decisions warrant the conclusions: (1) If the defrauded party is content with the recovery of only the amount that he actually lost his damages will be measured under that rule (the out-of-pocket-loss rule); (2) if the fraudulent representation also amounts to a warranty, recovery may be had for loss of the bargain because a fraud accompanied by a broken promise should cost the wrongdoer as much as the latter alone; (3) Where the circumstances disclosed by the proof are so vague as to cast virtually no light upon the value of the property had it conformed to the representations, the court will award damages equal only to the loss sustained; and (4) where . . . the damages under the benefit-of-the-bargain rule are proved with sufficient certainty, the rule will be employed." (Emphasis added)

As to the first of the aforementioned requirements, it is needless to say that the defrauded party in the instant case is not content with recovery of the amount actually lost. As to the second requirement, the fraudulent representation in this case was in the very nature of a warranty[3] and was related directly to the contract. With regard to the third requirement, there is no question as to the value of the "property" had it conformed to the representations. If it had so conformed, the value would have been the amount to be earned under the contract for the entire one year period. Therefore, the fourth requirement that the damages must be proved with sufficient certainty has been met.

But for the fact that the appellant was induced by fraud and deceit

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[3] Black's Law Dictionary, Fourth Edition defines "warranty" on page 1758 as follows: "an undertaking or stipulation, in writing, or verbally, that a certain fact in relation to the subject of a contract is or shall be as it is stated or promised to be . . . an expressed or implied statement of something undertaken as part of a contract but collateral to its object." (Citations omitted)

to believe that she would be receiving a certain benefit, she would not have made the contract at all. *Kentrick v. Ryus*, 225 Mo. 150, 123 S.W. 927, 135 Am. S. Rep. 585 (1910). In view of this, it seems a perversion of justice not to compel the perpetrator of the fraud to make good his representation. Application of the majority rule would have precisely this effect. *Epp v. Hinton*, 91 Kan. 513, 138 P. 576, LRA 1915a (1914). As was held in *Gustafson v. Rustemeyer*, 70 Conn. 125, 39 L. 104, 30 LRA 644, 66 Am. St. Rep. 92 (1898). ". . . the loss of the benefits of the bargain is one of the elements of damages which the defendant must be held to have contemplated as the natural and proximate result of his conduct, and for which he is therefore answerable."

As noted above, the District of Columbia Court of Appeals held that the majority and the minority rules are merely applications of the underlying "proximate result" rule and *should be employed in a flexible manner*. The holding set forth above from the case of *S. W. Selman et ux. v. H. E. Shirley, et al.*, supra, where the majority rule was applied is to the same effect. In accordance with this principle, it is difficult to imagine a case more ideally suited than this one for application of the rule urged by appellant. Aside from the fact that operation of the minority rule would result in the appellee's having to pay little or no damages for its fraud, or damages less than it would have to pay under breach of contract, there is also the consideration that the circumstances of this case make it unsusceptible to its application. As the District of Columbia Court of Appeals itself noticed, the award of damages must have been based on sheer speculation. (JA 4). Appellant testified that prior to being employed by respondent, she was doing free-lance work (JA 3). Her testimony as to her earnings prior to being employed by appellee was uncertain. (JA 3-4) It was clearly evident that she did not maintain records of these job-contracts since *she could not have anticipated when she accepted employment with respondent that she might eventually have to produce such records in litigation*. Therefore, the minority rule

denies recovery to innocent individuals whose understandable ignorance prevents them from detecting the fraudulent element in representations calculated to induce entry into a contract. "The minority rule places a premium on fraud and deceit, since under that measure of damages the defendant would often get out much easier by virtue of his fraud than if he had only been guilty of breach of contractual warranty." *Hallen v. Martin,* 40 S.E. 343, 167 N.W. 314 (1918); *Stout v. Martin,* 87 W. Va. 1, 104 S.E. 157 (1920). See also 124 ALR 47. It seems incredible to hold that appellant is entitled to a lesser amount of damages under a theory of fraud, which is always morally reprehensible, than she is entitled to under a theory of breach of contract, which although legally wrong, is sometimes morally excusable. ". . . A wilful fraud should cost as much as a broken promise." McCormick, 28 Ill. Law Rev. 1050, 1055. Moreover . . . "why should more be obtainable in one form of action than in the other? We abolished the forms of action in order to obviate that absurdity and to make it possible to award adequate relief to the victim of the wrong regardless of the form of the action." *S. W. Selman, et ux. v. H. E. Shirley, et al.,* supra.

It should also be noted that if the decision of the District of Columbia Court of Appeals is allowed to stand, it would not only affect the appellant but would also facilitate the victimizing of thousands of persons induced by fraudulent misrepresentations to enter into contracts. Common experience indicates that a large number of civil cases before the courts of this jurisdiction are directly the result of contracts induced by fraud. Application of the benefit-of-the-bargain rule where appropriate would be a deterrent to such practices.

In its opposition of May 5, 1966 to appellant's Brief in Support of Petition for Allowance of Appeal, appellee contended that application of the benefit-of-the-bargain rule would permit speculation as to damages rather than a true measure of loss — that this rule would open the door to speculative damages. Since it is expected that appellee will repeat

this contention in response to this brief, appellant must stress that application of the majority rule in this case would have precisely the opposite effect. The employment contract was for a definite period of time (12 months) and for a definite salary ($600.00) per month (JA). While it is true that in certain factual situations application of the majority rule would result in speculative damages, it is inconceivable that any other rule in this type of case could enable a more certain and precise determination of damages. Moreover, employment of the minority rule would itself result in speculative damages where the nature of the out-of-pocket-loss is such that its value cannot be determined with reasonable certainty. Again, as the District of Columbia Court of Appeals noted, the majority and minority rules are applications of the underlying "proximate result rule" and should be employed in a flexible manner.

In its opinion the District of Columbia Court of Appeals cited several cases in support of its holding that the minority rule was applicable in the District of Columbia. (JA 3)[4] A close examination of these cases reveals that the nature of the property conveyed to the defrauded party was such that its value, had it conformed to the representations, could not be determined with sufficient certainty. Although the cases do not state specifically that this was the reason for applying the out-of-pocket-loss rule, it would seem that this was at least an implied consideration in so doing.

> "Probably also the courts of a particular state in the first case in which the choice it presented would be unduly influenced for or against the 'loss of bargain' formula (under which the jury must find what the value

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[4] *Kent Homes, Incorporated v. Frankel*, D.C. Mun. App., 128 A.2d 444, 445 (1957), citing *Hirshon v. Whelan*, D.C. Mun. App., 122 A.2d 114 (1956); *Horning v. Ferguson*, D.C. Mun. App., 52 A.2d 116, 119 (1947), citing *Federal-American Nat. Bank & Tr. Co. v. McReynolds*, 62 App. D.C. 291, 67 F.2d 251 (1933); *Smith v. Bolles*, 132 U.S. 125 (1889).

> of the thing bargained for by the plaintiff would have been if it had been as represented) depending on whether in the particular case the hypothetical value is subject to be checked by comparison with other property possessing the quantities represented - in which case the 'loss of bargain' standard can be easily applied - or on the other hand, whether the representation is value or exaggerated, in which case this formula offers little tangible guidance to the jury, and leads judges to fear extreme results. McCormick, 28 Ill. Law Rev. 1050, 1054."

In the case of *Smith v. Bolles*, supra, which seems to have established the rule for the District of Columbia, the defendant made representations indicating that certain silver mines in Arizona were of an immense value and thereby induced the plaintiff to purchase stock at $1.50 per share. The defendant did not attribute a definite and specific value to the stock. As it developed, the mines were worthless. The plaintiff alleged that if the property had been as represented, the stock would have been worth $10.00 per share. The trial court's instruction to the jury contained the following: ". . . the measure of recovery is generally the difference between the contract price and the reasonable market value, if the property or stock is entirely worthless, then its value is what it would have been worth if it had been as represented by the defendant, and as may be shown in the evidence before you." The United States Supreme Court held that this was an erroneous instruction and stated at page 129 the following: "He was bound to make good the loss sustained, such as the money the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation."

It is significant that the Supreme Court used the term "speculation" - a clear indication that it was the speculative nature of the transaction

and the impossibility of determining the value of the property had it conformed to the representations that compelled the Court to hold as it did. Also, it is interesting to note that in McCormick's Law Review article, supra, a brief but comprehensive discussion of the choice of remedies in cases of deceit - reference is made to *Smith v. Bolles*, supra, on page 1051, footnote No. 9, as follows:

> "*Smith v. Bolles*, 132 U.S. 125, 10 S. Ct. 39, 33 L. Ed. 279 (1889) (action of deceit by purchasers of stock of mining corporation; held, erroneous to instruct that measure was difference between contract price and value if as represented; plaintiff limited to his actual loss; court bases result on view that wrongdoer is liable only for consequences which he might reasonably have contemplated - a proposition dubious in its soundness, and in its application)." [5]

A decision by this Court that in certain appropriate cases the majority rule should be employed would not be diametrically opposed to the holding of *Smith v. Bolles*, supra, which is said to have established the rule for the Federal courts. Such a "predicament" would be legitimately avoided by basing the decision on the valid distinction between those cases where it can be determined with reasonable certainty what the value of the property conveyed by the perpetrator of the fraud would have been had it conformed to the representations and those cases where such value cannot be determined. This is a distinction which the Supreme Court must have contemplated and which it might have mentioned had it not been for the obviously speculative nature of the transaction.

An analysis of the cases cited by the District of Columbia Court of

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[5] It would seem a reasonable assumption that the wrong-doer contemplates as the consequence of his fraud whatever the law provides as the proper measure of damages.

Appeals in addition to *Smith v. Bolles,* supra, compels the same conclusions.

The appellee may object that in seeking application of the benefit-of-the-bargain rule the appellant is actually seeking imposition of punitive or exemplary damages. However, in speaking of punitive damages, one cannot speak in terms of what was within the contemplation of the parties or the "natural and proximate result" of the fraud. Therefore, there is no certain formula for determining the amount of such damages. Consequently, even where punitive damages are awarded, if the minority rule is applied the perpetrator of the fraud may still benefit by its application in that the total amount of recovery may be less than he would have to pay under breach of contract or under the majority rule. Another consideration is that in the District of Columbia, an award of exemplary damages may be so excessive as to justify setting aside the verdict. *Flannery v. Baltimore & O. R. Co.,* 4 Mackey 111, 15 D.C. 111 (1885). While it is conceivable that the defrauded party may recover more under the minority rule plus an award of exemplary damages, nevertheless for the same reasons stated above such a formula is not satisfactory. Moreover, there is no reason to deny to the defrauded party an award of punitive damages in addition to recovery under the benefit-of-the-bargain rule.

CONCLUSION

For the reasons stated above, the decision of the District of Columbia Court of Appeals should be reversed and remanded for disposition not inconsistent with the opinion of this Court.

Respectfully submitted,

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JOINT APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 3840

Ida Espaillat, Appellant,

v.

Berlitz Schools of Languages of America, Inc., appellee.

Appeal from the District of Columbia
Court of General Sessions

(Argued February 7, 1966 Decided March 24, 1966)

Ira M. Lowe, with whom *Stylianos J. Gratsias* was on the brief, for appellant.

John F. Gionfriddo, with whom *M. S. Mazzuchi* was on the brief, for appellee.

Before Hood, Chief Judge, and Quinn and Myers, Associate Judges.

MYERS, *Associate Judge:* Appellant, a citizen of the Dominican Republic, came to this country in February 1962. Until the first of June she engaged in free-lance work as an interpreter-translator in the District of Columbia, at which time she accepted a position in that capacity with appellee to work at the United States Army Special Warfare School at Fort Bragg, North Carolina. Under the terms of her employment contract, she was appointed for one year from June 1, 1962, to May 31, 1963, at a salary of $600 a month, subject to the provision that the Army reserved the right to discharge her at any time during this period. When she had been working for a short time, the government informed her, and all other alien employees similarly engaged, that only United States citizens could serve on the program and the entire alien staff would be replaced . Appellant's employment was terminated as of July 20, 1962. Subsequently she filed suit

against Berlitz for breach of contract, seeking damages in the amount of $3,482.42, representing loss of anticipated earnings and expenses incurred in seeking new employment, less wages earned elsewhere during the balance of the contract period. During the course of trial the judge permitted appellant to withdraw her claim of breach of contract and to proceed upon the basis of a fraudulent inducement by Berlitz to enter the employment contract. At the conclusion of the trial the jury rendered a verdict in favor of Mrs. Espaillat for $2,000. Upon a motion filed by Berlitz for judgment notwithstanding the verdict, the trial judge granted judgment for Berlitz on the sole ground that, although the issue of fraud was one for the jury, appellant's evidence failed to establish any basis upon which the jury could find damages. This appeal followed.

In disposing of this appeal, we must analyze the record from two aspects: (1) Does it contain sufficient convincing evidence to support the action of the trial judge in submitting the issue of fraud to the jury and upholding the resolution thereof by the jury in favor of appellant; and (2) is there competent evidence therein to support the award of damages?

Although Mrs. Espaillat was aware her employment was subject to the condition that the government reserved the right to terminate it at any time,[1] she had, prior to actually accepting the position, specifically inquired of appellee whether the fact she was an alien would interfere with the job and was told it would not. This was untrue, as Berlitz well knew from its discussions with officials of the government. Failure of Berlitz to inform appellant that the Army had modified its policy with reference to the employment of aliens at Fort Bragg and would replace aliens in the program with United States citizens was valid grounds to support the jury's finding of fraudulent inducement to enter the employment contract.

However, the award of damages by the jury presents the primary question for review here. We must decide whether the trial judge was correct in granting judgment for Berlitz notwithstanding the jury's finding in appellant's favor and its award of damages to her.

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[1] Dismissal of Mrs. Espaillat was solely attributable to the fact she was an alien.

Appellant argues she should have the "benefit of the bargain" rule applied in fixing damages. We do not agree. There are two conflicting rules for the proper measure of damages in a tort action for fraud or fraudulent inducement to enter a contract for the sale or exchange of property, and although the present case does not involve the sale or exchange of property, the same rules are applicable. The weight of authority in this country sustains the general or "benefit of the bargain" rule that the defrauded purchaser may recover the difference between the actual value of the property at the time of making the contract and the value it would have possessed if the representations had been true. The minority rule approves as the measure of damages the difference between the actual value of the property and the amount or value of the consideration given by the defrauded party. Also allowable are so-called incidental damages to compensate the defrauded party for expenditures made in reliance upon the misrepresentation in order that the parties may be placed in *status quo ante*. This gives the purchaser only what he actually parted with or what he experienced in out-of-pocket losses by reason of the fraud. This is the Federal rule. Both the majority and the minority rules are merely applications of the underlying "proximate result" rule and should be employed in a flexible manner.

We follow the Federal rule in this jurisdiction, holding that the measure of damages is what the defrauded person lost by being deceived into entering the contract—not what he might have gained thereby.[2] Here the jury was instructed that, if it found fraud, damages were limited to such compensation as would make appellant's position as good as it would have been had she not entered into the contract.

Viewed in the light of the applicable law, we find the award of damages erroneous. Appellant's testimony detailed no previous regular employment in this country, except on a free-lance basis, nor did it disclose her earnings prior to her assignment with Berlitz. Principally it

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[2] *Kent Homes, Incorporated* v. *Frankel*, D.C.Mun.App., 128 A.2d 444, 445 (1957), citing *Hirshon* v. *Whelan*, D.C.Mun.App., 122 A.2d 114 (1956); *Horning* v. *Ferguson*, D.C.Mun.App., 52 A.2d 116, 119 (1947), citing *Federal-American Nat. Bank & Tr. Co.* v. *McReynolds*, 62 App.D.C. 291, 67 F.2d 251 (1933); *Smith* v. *Bolles*, 132 U.S. 125 (1889).

centered about the many difficulties she encountered in acquiring adequate or acceptable work after her dismissal and her earnings during the ensuing approximate ten months. Lacking was any evidence upon which the jury could make a comparison between her earnings prior to her employment with Berlitz and those during the ten months after her discharge. With such a paucity of factual data available to the jury, we have no alternative but to find that the award must have been made on sheer speculation.

Appellant argues that the case of *Andolsun* v. *Berlitz Schools of Languages of America, Inc.*, D.C.App., 196 A.2d 926 (1964), supports the award of damages to her. Aside from the fact that Andolsun was another interpreter-translator employed through Berlitz to work at the Army Special Warfare School at Fort Bragg at the same time as appellant and was discharged for the same reason —his alien status—there is nothing in the *Andolsun* case to aid appellant in respect to her claim for damages. Factually the cases are distinguishable. Andolsun had been employed with the United States Information Agency for twelve years. His previous income was established. Appellant presented no comparable evidence upon which the jury could predicate an award of damages.

Although the jury found there was a fraudulent inducement by Berlitz, the trial judge was correct in granting judgment *n.o.v.* in favor of appellee for failure of appellant to prove damages.

Affirmed.

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,087

IDA ESPAILLAT, *Appellant*,

v.

BERLITZ SCHOOLS OF LANGUAGES OF AMERICA, INC., *Appellee*.

Appeal from the District of Columbia Court of Appeals

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,087

IDA ESPAILLAT, *Appellant,*

v.

BERLITZ SCHOOLS OF LANGUAGES OF AMERICA, INC., *Appellee.*

Appeal from the District of Columbia Court of Appeals

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This action was brought by plaintiff for breach of contract alleging that plaintiff and defendant entered an employment contract for a period of one year, June 1, 1962 to May 31, 1963 and that defendant discharged plaintiff on July 24, 1962 in breach of that contract.

Defendant answered admitting the existence of the employment contract, denying that it breached the contract

and avering that the plaintiff was dismissed by direction of the Army under the terms of the contract which provided among other things that plaintiff could be dismissed by order of the Army for any reason that was in the best interest of the United States.

The case was pre-tried and issues joined as to breach of contract; and came on for trial on April 20, 1965. Plaintiff presented her case on breach of contract.

At the end of plaintiff's case, defendant moved for a Directed Verdict grounded upon defendants failure to produce evidence of breach of contract. While defendants motion was pending plaintiff moved to amend her complaint to sound in fraud. The Court denied defendants motion and granted plaintiff's motion.

At the close of all the evidence, defendant again moved for a directed verdict. Plaintiff withdrew her complaint of breach of contract and the Court reserved its ruling on defendant's motion as to fraud.

The case was submitted to the jury as to fraud and the jury returned a verdict in the amount of $2,000.00.

Defendant filed a motion for ~~upon~~ judgment N.O.V. or for directed verdict on its previous motion.

The Court granted defendant's motion for judgment notwithstanding the verdict upon which plaintiff appealed to the District of Columbia Court of Appeals. That Court affirmed the Trial Court. This appeal followed.

SUMMARY OF ARGUMENT

The law of damages in fraud has long been established in this jurisdiction. It is clear that in these cases damages are limited to compensation necessary to put the plaintiff in the position he would have been in had he not entered the transaction at all. That law was followed by the Court below as the appellant admits. The rule giving rise to

that law is commonly referred to as the "out of pocket loss" rule and allows a plaintiff to recover his actual losses but does not permit speculation into what plaintiff could have profited from the transaction.

Appellant advocates that the existing law be changed to adopt the so called "benefit of bargain" rule which allows as damages in cases involving purchases the difference between the consideration given for the thing purchased and the represented value of the thing at the time the contract was entered into.

Where followed, that rule is only applied to contracts of purchase where the purchaser chooses to retain the thing purchased but still has losses. It is not applied in personal service or employment contracts and does not lend itself to such application. Appellant offers no authority for its application in such instances and the authorities treating the law of damages in personal service contracts apply the "out of pocket" rules as was done by the Court below.

In the case at bar appellant could not recover damages as she did not offer evidence sufficient to establish damages. The law available to her provides the means of recovery if there is an actual loss. The inadequacy here, if any, is not in the existing law but in the evidence of damages offered by appellant at trial. They suffered no loss.

Fraud without damage is not unique. One of the essential elements of an action for fraud is a loss. Without loss there is no action for fraud. Appellant supplied no evidence of loss or damage.

To allow appellant's theory is to leave the realm of compensation and award punitive damages. She did not sue for punitive damages. That is an area separate and distinct for the question here and not affected by either the "out of pocket" or "benefit of bargain" rules which are limited to the area of compensatory damages.

ARGUMENT

It is the general rule that one injured by the commission of fraud is entitled to recover such damages in a tort action as will compensate him for loss or injury actually sustained and place him in the same position that he would have occupied had he not been defrauded. *24 Am. Jur. 211.*

In the case at bar the District of Columbia Court of Appeals and the Trial Court before it applied the existing law in this jurisdiction in arriving at their decisions.

In order to put appellant in the position she would have occupied had the fraud not been committed, it requires as a prerequisite some knowledge of what her prior position was. Since the employment contract in question was for a term of one year, computation of damage would be had by subtracting appellant's actual income for that year from what her income would have reasonably been had she not entered into the contract. No evidence was offered as to her prior income or what her income could reasonably have been expected to be had she not entered the contract. Therefore computation was impossible.

The law in this jurisdiction is and has been that the measure of damages in fraud is sufficient compensation to make plaintiff's position as good as it would have been had he not entered the transaction at all. *Smith* v. *Balles,* 123 U.S. 125; *Federal Am. Nat. Bk. & Tr. Co.* v. *McReynolds,* 62 App. D.C. 291, 67 F. 2d 251; *Horning* v. *Ferguson,* 52 A. 2d 116, 119; *Hushon* v. *Whelan,* 122 A. 2d 114; *Kent Homes, Inc.* v. *Frankel,* 128 A. 2d 444, 445.

Appellant admits that the law as applied by the Court below is the existing law in the District of Columbia. That law follows the proximate result rule.

Within the proximate result rule, courts have applied the "benefit of bargain" rule and the "out of pocket loss" rule. Appellant advocates the application of the "benefit of bargain" rule to the case at bar.

Where that rule is applied it is universally applied to contracts involving the sale of goods or chattels and in some cases to real property. Appellant offers no authority for application of the rule in personal service or employment contracts; nor can appellee find any such authority. To the contrary, in such cases the authority is that the rule applied is the "out of pocket" rule, as will be later treated.

The "benefit of bargain" rule is applied in cases involving tangible property and real property because it gives the plaintiff the opportunity to in effect affirm his contract and still bring his action in tort. In the case of *S. W. Selman, et ux* v. *H. E. Shirley, et al.*, 85 P. 2d 384, 125 ALR 1, so heavily relied upon by appellant, the defendant sold the plaintiff real estate representing some 4,000 cords of timber that was standing on the property, which timber could be cut and marketed by plaintiff and the proceeds used to pay defendant for the property. The real estate in fact contained only 200 cords of wood. Plaintiff chose not to rescind and sue in fraud but to keep the real estate, and sue for damages. The court allowed as damages the difference between the value of 4,000 cords of lumber and the value of 200 cords of lumber. This was the benefit of the bargain, but still only the proximate result or actual loss. The "benefit of bargain" rule came into play only because plaintiff chose to keep the real estate but still had out of pocket losses. It is to this point that the court directed itself in the language relied upon by appellant on page 6 of her brief; with reference to whether or not the defrauded party is content to recover only his actual loss.

At 31 ALR 2d 1052 the case of *Louis Steinbaum Real Estate* v. *Maltz*, 247 S.W. 2d 652 is treated in which the court held as follows:

> "In an action for damages for fraud and deceit, *the purchaser, having elected to retain property,* may recover damages measured by the difference between the

> value of the property as represented and the actual value of the property at the time of sale; this rule enables *the purchaser* to recover the so-called "benefit of bargain." (Emphasis added)

Even in situations where property is involved the rule is not universally adopted in that it lends itself too freely to speculation.

With reference to the use of the "out of pocket" rule as opposed to the "benefit of bargain" rule the following appears at *24 Am. Jur. 59.*

> ". . . The damages recoverable under this (out of pocket) rule are measured by the loss which the defrauded party has sustained and not by the profit which he might have made by the transaction. The courts following it take the view that the complainant is entitled to no more than to be made whole on account of the loss sustained, on the theory that the question is what he lost by being deceived into the contract and not what he might have gained thereby and that this rule of damages excludes all speculation."

Following the established law in this jurisdiction the Court in *United Securities Corp.* v. *Franklin* (supra) stated the following:

> "But our view of the authorities persuades us that there is no inconsistency between affirmance and an action in tort for fraud in the inducement. By suing in tort the defrauded party 'does not seek to undo the fraudulent transaction but claims sufficient compensation *to make his position as good as it would have been had he not entered into the transaction at all.*' Five Williston Contracts 4264."

Every case cited by appellant in her brief in support of her position is cited in the treatment of *Selman* v. *Shirley* (supra) at 124 ALR 1 through 82. In each of the cases

cited, the Court was confronted with a situation similar to Selman. *Ketrick* v. *Ryus,* 225 Mo. 150, 123 S.W. 927, involved the misrepresentation of mining property under lease sold to plaintiff. *Epp* v. *Hinton,* 91 Kan. 513, 138 P. 576, involved representations concerning the quantity and location of land. *Gustafson* v. *Rustemeyer,* 70 Conn. 125, 39 A. 104 involved the quality of land and lumber. *Hallen* v. *Martin,* 40 S.D. 343, 167 N.W. 314, involved the fitness of land for agricultural purposes. *Stout* v. *Martin,* 87 W. Va. 1, 104 S.E. 157 involved the representation as to boundaries of timber. In each case the plaintiff was affirming a contract for the sale of land or tangibles and suing for the difference between what he paid for and what he received, which in effect is nothing more than actual loss or proximate result. None of the cases cited involved personal service or employment contracts.

More recently at 24 ALR 2d 733 through 746 the subject of personal services is treated in the treatment of *Hanlon* v. *MacFadden Publications, Inc.,* 302 N.Y. 502, 99 N.E. 2d 546. There at page 742, there is referred to by cite the earlier treatment of the "benefit of bargain" rule at 124 ALR 37 upon which appellant relies. There the rule is compared with the rule adopted by the American Law Institutes' restatement of the law of torts limited recovery to the difference between the actual value of property acquired by the plaintiff at the time of the making of the contract and the purchase money or other consideration parted with by him.

At 24 ALR 742 appears the following:

> "What in the ordinary case is the more generous rules for the defrauded party could not literally be applied in an action relating purely to personal services, since if the representations were taken as true there would be no recovery. (See *Salter* v. *Heiser, 39 Wash. 2d 826*). However, the fundamental purpose of the "benefit of bargain" rule might have place in determining whether, *when services are applied to materials to pro-*

> *duce something which is to be used or resold, the defrauding party should be liable for the producers profit on the article produced for him.*
>
> "The measure of damages in an action for deceit inducing personal services is *the actual pecuniary loss sustained as a direct result of the wrong.*" (emphasis added)

Had appellant been induced to render services for less than their worth she would be entitled to the actual value of the services actually rendered. In the case at bar, the appellant was paid in full for the services she actually rendered. That point is not in question. She gave nothing of value for which she was not fully compensated, whereas in the cases cited by appellant the plaintiffs had not received full value for the consideration given by them for tangibles and they were retaining the tangibles. If in fact appellant was induced by fraud to enter the contract she is entitled to compensation for her actual loss and to be returned to the position she would have been in had she not been induced to enter the contract.

Since the alleged fraud involves a contract of employment computation of appellant's measure of damages would require first the figure of what she was actually earning at the time she changed her position as a result of the fraud or put another way, what she would have earned in her previous status had the fraud not been perpetrated, less what she actually earned during the period effected by the fraud, here one year. Only by using such a basis can she be put in a position as good as she would have been had she not entered into the transaction at all.

Appellant offered no evidence whatsoever to establish earnings at the time she entered the contract, thus no figure was available from which to subtract the amount she earned during the one year period of the contract. The verdict of

the jury could only have been the result of speculation inasmuch as the mathematical basis from which to compute damages was not available to the jury.

The appellee cannot be charged with damages which cannot be computed, are the result of speculation and have no relation to any loss proven by the evidence.

Fraud without loss or damage is not uncommon. There is authority for the rule that where the complainant suffers no actual damage from fraud there is no cause of action and a plaintiff cannot recover even nominal damages. That principle is founded on the theory that because injury is an essential element of the wrong in fraud, where the plaintiff fails to show injury sufficient to sustain an action of fraud, there can be no recovery. 24 Am. Jur. 51.

The measure of damages here is limited to compensation necessary to put appellant in the position she would have been in had she not entered into the transaction at all. To apply a different measure as suggested by appellant is to leave the realm of compensatory damages and grant punitive damages in the name of compensation. The evidence is not sufficient to establish compensation and being incapable of computation, it cannot be left to speculation.

Appellant's position that she did not maintain records of her previous employment, since she could not have anticpated when she accepted employment with appellee that she might eventually have to produce such records in litigations, is not valid. She did not even attempt to offer her income tax records at trial.

The record is clear that in the Court below, as in the trial court, appellant relied heavily upon the case of *Andolsun* v. *Berlitz Schools of Languages of America, Inc.*, 196 A. 2d 926. (JA 4) There the plaintiff Andolsun produced evidence to establish previous income. (JA 4) Appellant produced no such evidence.

CONCLUSION

The law of damages in this jurisdiction is and has been well established. The Court below followed the existing law as appellant fully admits. That law follows sound reasoning in not permitting speculation and should be allowed to stand. Respecting personal service contracts it appears to be wisely applied universally by American courts and should be applied here as in the Court below.

Respectfully submitted,

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